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Appellee's Brief 1976-SC-0058

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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-58

4354

ROBERT EARL MANLEY - - - Appellant

versus

NANCE NURSING HOME,
PENINSULAR FIRE INSURANCE COMPANY,
SPECIAL FUND, and
KENTUCKY WORKMEN'S COMPENSATION BOARD - - - - - - - - - Appellees

APPEAL FROM McCRACKEN CIRCUIT COURT
HON. J. BRANDON PRICE, JUDGE

BRIEF FOR APPELLEES, NANCE NURSING HOME AND PENINSULAR FIRE INSURANCE COMPANY

FILED
APR 5 1976
MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

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This is to certify that I have mailed copies of this Brief to Appellant's Attorney, Hon. James W. Owens, 629 Washington Street, Paducah, Kentucky; to Hon. William Gadd, Attorney for Special Fund, Department of Labor, Frankfort, Kentucky 40601; Hon. William Huffman, Director of Kentucky Workmen's Compensation Board, Frankfort, Kentucky, 40601; and to Hon. J. Brandon Price, Trial Judge, McCracken County Courthouse, Paducah, Kentucky, on this 2nd day of April, 1976.

George R. Effinger

Attorneys for Appellees, Nance Nursing Home and Peninsular Fire Insurance Company

WESTERFIELD-BONYE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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SUPREME COURT OF KENTUCKY

File No. 76-58

ROBERT EARL MANLEY - - - - *Appellant*

v.

NANCE NURSING HOME,
PENINSULAR FIRE INSURANCE COMPANY,
SPECIAL FUND, and
KENTUCKY WORKMEN'S COMPENSATION
BOARD - - - - - - - *Appellees*

BRIEF FOR APPELLEES, NANCE NURSING HOME AND PENINSULAR FIRE INSURANCE COMPANY

May it please the Court:

COUNTERSTATEMENT OF FACTS

The appellant, Robert Earl Manley, a 27 year old unmarried white male, was employed by appellee Nance Nursing Home as a janitor and orderly on or about December 10, 1972, at a wage of $1.70 per hour for 40 hours per week (Culp Depo., pp. 10, 11, Qs. 10-14). Prior to this time he had worked briefly at various jobs as salesman in a furniture store, a welder, cleaning out river barges, building houses, and other similar employment. He appears not to have held any one job for very long at a time and had not worked anywhere

for some six months prior to going to work for defendant's nursing home (T.E., p. 14, Qs. 120-130).

Appellant alleges that he sustained an injury while at work on April 1, 1973. However, he continued to work regularly until April 18, 1973, when his employment was terminated because of inefficiency. It was not until some time after his termination date, and after he had been to a doctor of his own choice, that he notified his employer of his alleged injury (Cope Depo., p. 11, Qs. 16-20).

Lengthy briefs were submitted to the Workmen's Compensation Board by all parties, including the Special Fund. After careful consideration the Full Board on January 13, 1975, entered an Order dismissing plaintiff's claim. This action was based upon the following Findings of Fact, any one of which by itself would be sufficient to justify the Board's action:

(1) Plaintiff failed to sustain the burden of persuading the Board that a work-related event occurred which caused him occupational injury or harmful change in the human organism.

(2) Plaintiff was guilty of an unreasonable delay in giving the notice of the accident as soon as practicable after the occurrence.

(3) Plaintiff failed to convince the Board with sufficient evidence that he sustained any occupational disability directly attributable to an event which occurred during the short period of time he was in the employ of the defendant.

ARGUMENT

The defendant submits that the Workmen's Compensation Board and the McCracken Circuit Court, which sustained its Order, were justified in dismissing plaintiff's complaint upon any one of the grounds set forth in the Board's Order.

I. Did a Work-related Event Occur Causing Plaintiff to Suffer an Occupational Injury or Harmful Change in the Human Organism?

It is an elemental rule of law that the Board is the trier of the facts, and that the plaintiff has the burden of persuasion in presenting his case for determination. One of the many Kentucky cases so holding is *Lee* v. *International Harvester Company,* 373 S. W. 2d 418 (1963), where the Court said:

> "As a fact finding agency the Board is in the same position as a jury, and the same rules apply. The claimant, bearing the burden of proof 'has the risk of not persuading the Board in his favor.' Columbus Mining Co. v. Childers, Ky., 265 S. W. 2d 443, 445 (1954)." (at page 420)

In *South 41 Lumber Co.* v. *Gibson,* 438 S. W. 2d 343 (1969), this rule was reaffirmed by this Court, which held:

> "The Board is the 'fact-finding agency' and 'is in the same position as a jury, and the same rules apply.' Lee v. International Harvester Co., Ky., 373 S. W. 2d 418 (1963). Its decision must stand unless we are convinced 'that the evidence before

> the board was so conclusive that it required a finding of permanent total disability.' Joseph v. Blue Diamond Coal Co., Ky., 408 S. W. 2d 467 (1966). Cf. Young v. Mill Branch Mining Co., Ky., 435 S. W. 2d 451 (1968)." (At page 344)

This same rule was again cited with approval in *Ferrell* v. *A. O. Smith Corporation,* Ky., 445 S. W. 2d 121 (1969).

Mr. Manley, of course, contends that he reported the incident at the time it occurred. This statement is uncorroborated and directly refuted by not only the testimony of Mr. Culp, but also the testimony of Mrs. Sherman, with whom the plaintiff was allegedly working at the time of his injury. Mr. Culp testified that his first knowledge of plaintiff's complaint was some time subsequent to May 7, 1973, some six weeks after the alleged incident and three weeks after Manley had been dismissed for inefficiency. In this case it should also be noted that Manley continued to work regularly for some 18 days after his alleged injury without complaint either to his employer or a fellow employee, and without seeking any medical attention.

The many contradictions in plaintiff's testimony are made clear by a reading of the transcript in this case. He says his back hurt him from the time of his injury on April first, and yet he did not seek medical attention until May 7, 1973. He says he did not go to the doctor until his employer gave him a "slip of paper," but at the same time contends he received this paper before he was laid off (Manley Depo., p. 6, Q. 15), and yet he did not go to the doctor until May 7th. In addition he

admits that when he first reported the incident to his employer he was complaining of having hit himself in the stomach with a mop handle.

Mrs. Peggy Sherman, employed by the nursing home as a nurse's aide, testified that she attended the patient whom Manley claims he was attempting to lift, and that she had no knowledge of any injury which he sustained nor did Manley ever report or relate to her such an incident (Sherman Depo., p. 4, Qs. 21, 22).

Further proof that plaintiff was not injured as he contends is that the patient he reports as trying to lift, a Mrs. Perkins, was not even admitted to the nursing home until April 14, 1973, two weeks after the alleged injury.

Plaintiff contends that he sustained an injury to his back on April 1, 1973, and that he had immediate and continuous pain thereafter, which progressed to a point where he was unable to perform his duties. This contention is not supported by the evidence. In the first place, Mr. Manley did not report an injury to his back during the course of his employment. This is testified to by both Mr. Culp and Mrs. Sherman. Neither did he, at the time of his discharge, make any mention of any back injury. In her deposition Mrs. Sherman testified that the first knowledge she had Mr. Manley was having trouble with his back was some two months after he had been discharged when she was contacted by an insurance man who was investigating the claim (Sherman Depo., pp. 6, 7).

Sometime after his dismissal by the defendant, and after he had been to his own doctor, Mr. Manley con-

tacted Mr. Culp and requested authorization to go to a chiropractor. Culp informed him that he did not think the insurance company would pay for a chiropractor, but did suggest he go to a medical doctor (Culp Depo., p. 12, Q. 22). Mr. Culp at no time suggested a particular doctor since he had been advised that the employees were free to go to the doctor of their own choice (Culp Depo., p. 15, Q. 10). Manley claims that Mr. Culp gave him a note to take to the doctor—he thinks this was before his employment was terminated, although this is denied by Mr. Culp—but regardless of when he received the note, he did not report to any doctor for any purpose until he saw Dr. Leeper on May 7, 1973, some six weeks later.

II. Appellant Unreasonably Delayed Giving Notice of His Alleged Injury.

Appellant in his brief admits that the Board had adequate evidence to find as a fact that notice was not given on April 1, 1973, as alleged. He argues, however, that the giving of notice six weeks later and subsequent to May 7, 1973, was timely. Appellee submits that if Manley had in fact been injured on April first as alleged, he had full opportunity to notify his employer during the 18 days thereafter that he worked. Having done so, the employer could have conducted a full investigation of the incident and seen that appellant was adequately provided with proper medical attention. Instead Mr. Manley chose to remain silent, and it was not until several weeks following his dismissal and

after he had been to a medical doctor of his own choice that he sought to relate his problem to his employment. What could have been more convenient or reasonable than for him to have advised his employer at the time of his dismissal that the reason for his inefficiency was at least in part due to a problem he was having with his back from a work-related injury. This of course he did not do. When finally he did seek to make a report the record reveals that he first related his problem to an incident when his mop handle struck the roof while mopping, and at that time sought to be sent to a chiropractor for treatment.

The very purpose of the Statute is to give the employer adequate opportunity both to investigate an alleged injury and to provide adequate medical treatment where it is required. Appellee has been deprived of both of these opportunities by the unreasonable delay in reporting the incident.

KRS 342.185 requires notice of the accident be given to the employer as soon as practicable before a proceeding can be maintained. It is clear from the above that such notice was not given to the defendant. The Court of Appeals has held that compliance with the above section is mandatory, and if there is a delay in giving notice the burden is on the plaintiff to establish that it was not practicable to notify the employer sooner. *Sexton* v. *Black Star Coal Corp.*, 296 S. W. 2d 450 (1956).

In *Inland Steel Co.* v. *Byrd,* 316 S. W. 2d 215 (1958), it was held that:

> "Of course, we must look to the evidence in each case in order to determine whether the circumstances constitute a reasonable cause for delay in giving the statutory notice beyond the period which might otherwise not be 'as soon as practicable.'" (at page 217)

In this case the appellant clearly failed to meet this requirement by not only failing to report the incident during the 18 days that he worked, during all of which time he states that he had problems with his back, but in delaying for an additional three weeks before seeking to notify his employer.

It is interesting to note that although Mr. Manley was first examined and treated by a general practitioner, Dr. Leeper of Paducah, who referred him to a neurosurgeon, Dr. John Noonan of Paducah, neither of these was called to testify on his behalf. Instead, after counsel was employed he was referred by his attorney, first to Dr. George Ainsworth at Madisonville, who saw him on August 8, 1973, and subsequently to Dr. W. McDaniel Ewing, orthopedic surgeon in Louisville, who made his examination on September 25, 1973. Thereafter, upon direction of the Board he was also examined by Dr. K. Armand Fischer, orthopedic surgeon of Louisville.

Again the burden of persuasion is on the plaintiff and this he has failed to meet.

III. Appellant Has Failed to Prove Any Significant Occupational Disability.

Neither the initial treating physician, Dr. Leeper, nor the neurosurgeon to whom he was referred, Dr. John Noonan, was called by the plaintiff to testify in this case.

Dr. Ainsworth, who examined Mr. Manley at the request of his own attorney, testified that Manley exaggerated his complaints and that he could not demonstrate any objective evidence of injury. Dr. Ainsworth further stated Manley could return to work at a nursing home at that time (Ainsworth Depo., pp. 5, 6, Qs. 6, 7). In this doctor's opinion, based on the history, Manley had a muscle strain which had subsided (Ainsworth Depo., p. 5, Q. 6).

Dr. Ewing also saw Mr. Manley at the request of his attorney, and he also diagnosed plaintiff's condition as a back sprain (Ewing Depo., p. 7, L. 15). However, due to pre-existing conditions, the doctor felt that Mr. Manley should not go back to work at a nursing home. Dr. Ewing recommended a back brace for Manley, which he did not obtain. The brace in the doctor's opinion would allow Manley to return to work (Ewing Depo., p. 12, Ls. 7-9).

Dr. Fischer saw Mr. Manley at the request of the Board. In this doctor's opinion plaintiff had a 7½% disability due to a pre-existing dormant non-disabling condition which was aroused into disabling reality, namely degenerative disc disease (Fischer Depo., p. 17, L. 20). Dr. Fischer also testified that Manley had a

7½% disability due to the accident itself; however, he does not say what condition is causing this additional disability.

Dr. Fischer also gave a long discourse on anxiety reaction, which the doctor said pre-existed the alleged injury of April 1, 1973. All of the limitations which Dr. Fischer found existed prior to April 1, 1974 (Fischer Depo., p. 2, Ls. 11-15).

There is no doubt that the plaintiff has exaggerated his symptoms to every physician he saw.

Dr. Ainsworth was quite candid with the Board when he explained the result of his physical examination.

> "It was noted that he was able to stand erect. His spine was straight. There was no pelvic tilt. Palpation of the back revealed voluntary muscle spasm in the lumbar area. The patient was not able to move too well in any direction, it was felt that this was due to his voluntary muscle spasm and not due to involuntary muscle spasm. As the examination progressed the patient was encouraged to move in both flexion and extension and in right and left lateral bend. When moving from side to side, that is bending from side to side, there was complete relaxation of his voluntary muscle spasm. * * * I felt that no specific treatment was indicated and that at this point following the patient's injury he could return to his regular employment at the Nursing Home." (Depo. Dr. Ainsworth, at pp. 4, 5, 6)

It is also interesting to note that the X-ray of the lumbosacral spine showed no bone or joint abnormality.

Dr. Ewing also suspected that Mr. Manley was not being totally honest when the doctor qualified his physical examination by stating that Manley's limitation in movement is a subjective sign and in control of the patient (Ewing Depo., p. 6, Ls. 11, 12).

Dr. Fischer also stated that Manley guarded his back motions voluntarily (Fischer Depo., p. 5, L. 18, p. 6, Ls. 11-13).

There is no question that Mr. Manley was not injured to the extent he related to the doctors and to the Board. His voluntary attempted deception of his physical condition makes all of his testimony questionable and an accurate medical examination impossible.

KRS 342.035(2) states: "No compensation shall be payable for the death or disability of an employee if his death is caused, or if insofar as his disability is aggravated, caused or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice."

Dr. Ewing recommended a long Taylor back brace for Manley on September 25, 1973, and further testified that such a brace would allow Manley to return to work (Ewing Depo., p. 8, Ls. 16, 17, p. 12, Ls. 4-11).

Mr. Manley did not obtain this brace (Fischer Depo., p. 4, Ls. 17-18). Dr. Fischer also testified that he would recommend the same type of brace and further that the brace would help Manley perform his work (Fischer Depo., p. 17, Ls. 21-25, p. 18, Ls. 1-9).

If Mr. Manley did sustain an injury, it was nothing more than a back strain (Ainsworth Depo., p. 5, Q. 6; Fischer Depo., p. 20, Ls. 14-15; Ewing Depo., p. 7, L.

15), and Manley was able to return to work at the time Dr. Ainsworth examined him on August 8, 1973 (Ainsworth Depo., pp. 5 and 6, Q. 6).

Any disability Mr. Manley may have sustained is chargeable to the Special Fund.

KRS 342.120 provides:

> ". . . the Special Fund to be made a party to the proceedings if either or both of the following appears:
>
> . . . . . .
>
> (b) The employee is found to have a dormant non-disabling disease *or* condition which was aroused or brought into disabling reality by reason of a subsequent compensable injury by accident . . ."

Dr. Fischer testified that Mr. Manley has an anxiety overlay and a degenerated disc (Fischer Depo., p. 6, Ls. 18-20). Both of these conditions existed prior to his accident of April 1, 1973 (Fischer Depo., p. 7, Ls. 2-5, p. 10, Ls. 2-4). This doctor also admitted that it is difficult to distinguish between a conversion reaction and intentional overreacting during examination. Furthermore the doctor stated:

> "Q. If his anxiety reaction got better, could he not then return to the job as an orderly?
>
> A. I wouldn't send him back to being an orderly, it's too heavy, they have to lift patients and they subject their back to stress and strain.
>
> Q. Would you have given him that same advice, to refrain from that type of lifting even prior to April of '73, if by x-ray you saw that degenerated disc?

A. If I had seen that degenerated disc I would have told him he couldn't do the work." (Depo. Dr. Fischer, p. 21, Ls. 6-15)

Dr. Ewing diagnosed Mr. Manley as having an old scoliosis and severe poor posture and that these conditions were aggravated by the alleged injury of April 1, 1973 (Ewing Depo., p. 7, Ls. 12, 13, 19-22).

The doctor also testified that the only permanent disability Mr. Manley had was from these pre-existing conditions.

"Well, he had permanent disability when I saw him as far as his posture and scoliosis was concerned. As far as the injury is concerned, I don't think sufficient time had elapsed in the period of five months and three weeks since his injury—or would that be four months—that's right, five months and three weeks, that's not a sufficient time to tell whether the muscle spasm from the injury would subside, but I think he would continue to have permanent disability in the form of poor posture and scoliosis." (Depo. Dr. Ewing, p. 9, Ls. 3-12)

It is clear from the above that if Mr. Manley does have any permanent disability, which is not admitted but denied, it is the result of pre-existing conditions and any award therefor should be against the Special Fund.

Again the appellant has the burden of persuasion and again he has failed to meet it. With regard to conflicting medical testimony, the Board is the determiner of fact.

This rule was again stated with approval in the case of *Young* v. *Burgett,* Ky., 483 S. W. 2d 450 (1972), where it was said:

> "In all, seven doctors testified, three for the claimant and four for the appellants. There was a direct conflict in their testimony. We have held many times that the claimant must carry the burden of persuasion in these proceedings. And, where the Board has found against the party having the burden, the test is whether the evidence for the claimant was so persuasive as to require a finding in his favor. See Porter v. Good, Ky., 404 S. W. 2d 795. Where medical testimony is concerned, and that testimony is conflicting, the question of who to believe is one exclusively for the Board. Dave Hall v. Island Creek Coal Company, Ky., 474 S. W. 2d 890 (1971)." (At page 451)

CONCLUSION

The burden of establishing his claim is upon the appellant and appellees respectfully submit he has failed to meet this burden on any of the three points above discussed, the failure of any one of which is sufficient to deny his recovery. Admittedly the evidence is in conflict on some of the questions presented. However, in all cases the Workmen's Compensation Board is the trier of the facts and even should other minds disagree, the decision of the Board can not be reversed unless the evidence is so convincing to the contrary that reasonable minds could not disagree.

Wherefore, the appellees Nance Nursing Home and Peninsular Fire Insurance Company respectfully

demand that the Judgment of the McCracken Circuit Court sustaining the Order of the Workmen's Compensation Board, dismissing plaintiff's Petition be affirmed.

Respectfully submitted,

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